



+REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2931 OF 1997

JAMES NDERITU GACHAGUA

T/a JAGAR
CONSULTANTS.....PLAINTIFF

versus

KENYA PORTS
AUTHORITY.....DEFENDANT

R U L I N G

The plaintiff herein is a registered Quantity Surveyor carrying on business in the name and style of Jagar Consultants. The defendant is a body Corporate established under the Kenya Ports Authority Act Cap. 391 Laws of Kenya.

By a plaint dated and filed on 21st November, 1997, the plaintiff claimed a sum of Kshs. 97,283,585.85 against the defendant being the balance of Quantity surveying services rendered to the defendant by the plaintiff.

The defendant was served with summons to enter appearance on 1st December, 1997 whereafter an appearance was entered on 8th December, 1997 on its behalf.

On 11th December, 1997, the plaintiff lodged an application by way of Notice of Motion under Order 35 Rule 1 of the Civil Procedure Rules for summary judgment in the sum claimed in the plaint. The defendants defence was filed on 22nd December, 1997 and so were the grounds of objection and the replying affidavit to the Notice of Motion aforesaid.

The defence and the reply to the Notice of Motion raised two pertinent issues which had to be dealt with before the plaintiff's application for summary judgment could be addressed. The two issues raised by the defendant are that

- (a) the plaintiff did not give due notice to the defendant before the institution of the suit and (
- b) in any event the suit is stature barred under the provisions of the Kenya Ports Authority act Cap. 391 Laws of Kenya.

The submission of both learned counsel appearing for the respective parties herein are confined to those two issues and so will ruling be.

The relevant provision of law is section 66 of the Kenya Ports Authority act Cap. 391 Laws of Kenya

which provides as follows:

“66. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect. (a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.”

The application for summary judgment brought by the plaintiff was not prompted by the defence filed by the defendant. The said application was filed before the said defence was filed as I have shown in the dates set out hereinabove. Order 35 Rule 1 requires that the defendant has appeared for the plaintiff to bring the application.

On 2nd February, 1998, Owuor J. granted the plaintiff leave to file a further affidavit. This was filed on 5th February, 1998. Among the annexures is a letter dated 7th August, 1996 (“JNG13”) addressed to the Managing Director of the defendant by the plaintiffs then Advocates. I deem it necessary to set out in full the contents of the said letter. It reads as follows:

“19/1752/96/1

7th
BY
COPY BY RDINARY POST

August
REGISTERED

1996
POST

Managing
Kenya
P.
MOMBASA

O.

Ports

Box

Director
Authority
95009

Dear Sir,

REHABILITATION HEADQUARTER BALANCE CONSULTANTS <u>CONSTRUCTION ECONOMISTS.</u>	FO KSHS. QUANTITY	KENYA COMPLEX 97,283,585.80	PORTS - SURVEYORS	AUTHORITY OUTSTANDING JAGAR &
--	-------------------------	-----------------------------------	-------------------------	--

We have been retained by JAGAR CONSULTANTS with instructions to write to you as follows:

That pursuant to a contract dated 6th September, 1994 entered into between yourselves and our client to render Quantity Surveying Services on renovation and extensions to your headquarter Offices, our client proceeded and rendered services in accordance with the contract for which it submitted its fee notes amounting to the sum of Kshs. 110,252,624.85.

Out of this amount we are informed that you have paid the sum of Kshs. 12,259,039.00 leaving a balance of Kshs. 97,283,585/80.

Our instruction are therefore to demand from you which we hereby do payment of the sum of Kshs.97,283,585/80 plus accrued interest thereon in accordance with the conditions of Engagement (Cap 325) within FOURTEEN DAYS (14) from the date hereof failing which we are instructed to institute legal proceeding against you for recovery of the same without any further reference to you and at your risk as to court fees, advocates cost and other expenses that may be incurred as a result thereof.

Yours faithfully

NDUNGU NJOROGE & KWACH

signed

A. K. IGERIA

c.c. Jagar Consultants

NSSF
P. O. Box 54702.”

Building

As observed earlier this letter was introduced by way of a further affidavit. There has not been a rejoinder by the defendant to that affidavit. Section 70 of the Act provides for modes of service of notices upon the Managing Director of the defendant. These include sending the notice by post to the Managing Director.

Section 66(a) of the Act aforesaid does not prescribe the form of such a notice. It shall be sufficient if it contains the particulars of the claim and the intention to commence the action or legal proceeding.

The defendant did receive the notice; a reply dated August 22, 1996 - "JNG14" confirms this. The relevant part of the said reply reads:

“ Please note that we are seeking instructions from our Civil Engineering Department and shall revert soon.”

The letter addressed to the defendant by the then advocates for the plaintiff was clear and unequivocal. It complied with the requirements of section 66(a) of the act.

It is a notice for purposes of that section. The suit was not filed until 21st November, 1997 again, satisfying the requirements of the said provision. I must now turn to section 66(b) of the Act. It is the defendant's case that the plaintiff's suit is statute barred. The section limits the time within which proceedings shall be brought against the defendant. Action shall be brought within 12 months from the date the cause of action arose.

The defendant's position is that the plaintiff has said in his pleadings that the cause of action arose on 22nd March, 1995. The suit having not been filed until 21st November, 1997 the same is time barred. Even if a liberal interpretation were to be given, and the date of 19/2/96 be taken as the starting point as pleaded in paragraph 9 of the plaint, it is submitted the suit will not lie. To that end the application by way of Notice of Motion has no ground to stand on because the suit is incompetent.

On the other hand it has been submitted on behalf of the plaintiff ;that the fees due are payable at any time during the continuation of the project. The plaintiff was appointed as the Quantity Surveyor under the Architects and Quantity Surveyors act Cap 525 Laws of Kenya. It is submitted that the fees of the Quantity Surveyor like those of the Architect are always interim until the final services are rendered on either (a) the project being completed under the instructions or (b) on the termination or abandonment of the project.

The Fourth and Fifth Schedules to Cap. 525 have set out conditions of Engagement and scales of Professional charges for architects and Quantity Surveyors respectively. The provisions thereof are not specific in relation to the situation now facing the parties herein. I however, believe that there is enough material in the said schedules and the circumstances of this project that will enable the court to determine the issue of limitation.

There is no dispute that the plaintiff completed the Bills of Quantities, priced and forwarded them to the defendant. The plaintiff then sent his fee notes to the defendant totalling kshs. 110,252,624.85. Part payment was made leaving the balance now being claimed.

At no time did the defendant advise the Architect or the plaintiff that the project had been abandoned. In fact as early as 10th July, 1995 the defendant' Chief Civil Engineer wrote to the managing Director ("JNG7") to the effect that "the project is programmed for implementation in the 1996/97 financial year, and the documents now in our possession will still be useful then.'

The foregoing being the case, as at 22nd march, 1995 when the plaintiff submitted his fee notes and on which date the defendant says the plaintiff's cause of action accrued, the project was still open. Time could not have started to run against the plaintiff until the defendant took a step adverse or which could be construed adversely against it.

Further to the foregoing the averments of the plaintiff in the further affidavit filed on 5th February, 1998 in answer to the replying affidavit have not been contradicted. I am persuaded by the submission that since the defendant did not give any notice of termination or that the project has been abandoned or postponed the defendant cannot plead limitation as the contract is still open.

Lastly, in the affidavit in reply sworn by Mr Obed Njiru, paragraphs 8 and 9 thereof it is stated:

“ 8. That under the terms of appointment of the consultants and the sub-consultants there was a clear stipulation that professional fee shall only be paid at the construction stage.

9. That construction stage was not reached and the defendants are therefore not liable to pay the plaintiffs any fees as no fees have become due and payable under the terms of appointment.”

Of course the said averments have been denied by the plaintiff in the further affidavit. However, my reading of the said two paragraphs shows that the defendant admits that the project is still open and the time has not started to run against the plaintiff. This contradicts the pleadings in the defence and in the same affidavit that the plaintiff suit is statute barred.

In the end I find that the plaintiff's suit is not statute barred and is properly before the court. The preliminary objection raised is hereby dismissed with costs. Counsel are now invited to argue the substantive. Notice of motion on record. Orders accordingly.

Dated and delivered at Nairobi this 5th day of March, 1998.

A. MBOGHOLI MSAGHA

JUDGE